

**IN THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE**

STATE OF TENNESSEE, *ex rel.* ROBERT E. COOPER, JR., Attorney General and Reporter,)
Petitioner,) *QV2* D.C.
v.) No. 13C1625
LOCAL RECORDS OFFICE and UNKNOWN)
INDIVIDUALS d/b/a LOCAL RECORDS)
OFFICE,)
Respondents.)

**PETITIONER STATE OF TENNESSEE'S RESPONSE AND OPPOSITION TO
RESPONDENT LOCAL RECORD OFFICE'S MOTION FOR PROTECTIVE ORDER**

Petitioner, State of Tennessee, by and through Robert E. Cooper Jr., the Attorney General and Reporter for the State of Tennessee ("Attorney General"), at the request of the Division of Consumer Affairs ("Division") of the Tennessee Department of Commerce and Insurance (collectively "State"), hereby responds to and opposes Respondent Local Records Office's ("Local Records") Motion for a Protective Order on the grounds that Local Records' motion is untimely, unsupported, and fails to assert "good cause" for such relief as required by Tenn. Code Ann. § 47-18-106(b) of the Tennessee Consumer Protection Act ("TCPA"). More particularly, the State submits the following:

I. BACKGROUND

1. Local Records has been recently sending potentially deceptive mailings to Tennessee consumers. *See* Exhibit A to Local Records' Motion for Protective Order.

LOCAL RECORDS OFFICE
533 Church Street #142
Nashville, TN 37219
Phone: (800) 775-9059

THIS SERVICE TO OBTAIN A COPY OF YOUR DEED OR OTHER RECORD OF TITLE IS NOT ASSOCIATED WITH ANY GOVERNMENTAL AGENCY. YOU CAN OBTAIN A COPY OF YOUR DEED OR OTHER RECORD OF YOUR TITLE FROM THE COUNTY RECORDER IN THE COUNTY WHERE YOUR PROPERTY IS LOCATED.



*****LRO TUN19870304 DIGIT-114

Please Respond By:

04/09/2013

LOCAL RECORDS OFFICE

Local Records Office provides a copy of the only document that identifies [REDACTED] as the property owner of [REDACTED] by a recently recorded transferred title on the property.

Local Records Office provides a property profile where you can find the property address, owner's name, comparable values, and legal description or parcel identification number, property history, neighborhood demographics, public and private schools report.

Records obtained through public information show a deed was recorded in your name [REDACTED] on [REDACTED] which indicates your ownership and interest in the specified property below.

COFFEE COUNTY PUBLIC INFORMATION

Legal Property Address: [REDACTED]

2. The above is an excerpt from Ex. A to Local Records' Motion for Protective Order, which is a letter Local Records sent to a Coffee County consumer from the "Local Records Office" at 533 Church Street, #142, Nashville, TN 37219. *Id.* 533 Church Street is nothing more than a mail drop in a Nashville UPS store:

The UPS Store

The UPS Store
533 CHURCH ST
NASHVILLE, TN 37219

Get Directions to Our Store

(615) 248-6265
(615) 248-1017

store4087@theupsstore.com

ABOUT OUR STORE PRODUCTS & SERVICES TRACK A PACKAGE

CUSTOMIZED PACKAGING SOLUTIONS

Whether it's a small gift or an entire house, we have a solution.

See <http://www.theupsstorelocal.com/4087/> (viewed August 26, 2013).

3. Local Records apparently targets inexperienced, new homeowners and solicits a payment of \$89 from these homeowners for “a copy of the only document that identifies [the homeowner] as the property owner of [homeowner’s address] by a recently recorded transferred title on the property.” See Exhibit A to Local Records’ Motion for Protective Order. While Local Records’ letters look official and appear to come from the government, they are really from a California company looking to make \$89 each from every new homeowner who does not realize that Local Records is not a government office, and does not know that they can obtain a copy of their deed for a nominal fee from the government.

4. To date, at least seven state attorneys general, along with the United States Postal Service, have initiated investigations and/or lawsuits against Local Records. See Ex. G to the Affidavit of Assistant Attorney General Caitlin Doty at 7, filed concurrently herewith. (“Doty Aff.”).

5. On October 10, 2013, the Division, through the Attorney General, issued an investigative subpoena under the TCPA to Local Records known as Request for Information (“Request”) under Tenn. Code Ann. § 47-18-106(a)(1). A true and correct copy of the State’s Request is attached as Exhibit F to the Affidavit of Assistant Attorney General Caitlin Doty, filed concurrently herewith. (“Doty Aff.”) Under the terms of the State’s Request, Local Records’ response was due on or before November 13, 2012. *Id.*

6. On October 26, 2012, a California attorney representing himself as Local Records’ counsel sent a letter to the State advising the State that he represented Local Records and was in receipt of the State’s Request. See Exhibit A to Doty Aff. Among other

things, the California attorney told the State his client would not respond to the State's Request because "no civil or criminal action has been filed against my client . . . in this arbitrary and capricious state action." *Id.* He also told the State: "We have no idea what you are investigating." *Id.* California counsel also demanded to be advised "of the nature of this investigation, the legal authority for such action and who, if anyone, has filed or lodged complaints against my client." *Id.*

7. Notwithstanding the fact that the State's Request set forth the nature of the State's investigation on its face, *see* Doty Aff., Ex. F at 1-2, and cited to, and quoted from, Tenn. Code Ann. § 47-18-106(a), *id.* at 10, the State wrote to California counsel on November 5, 2012, and provided the requested information. *See* Ex. B to Doty Aff. The State advised California counsel that its investigations were confidential and for that reason the State could not provide complaint information during an ongoing investigation. *Id.*

8. After additional efforts by the State to obtain compliance with the State's Request failed, *see* Ex. C – E to Doty Aff., the State filed a Petition to Compel Local Records' Response to the Request on April 17, 2013 ("State's Petition"). *See* Docket 1.

9. On May 22, 2013, Tennessee attorney Don L. Hearn, Esquire, entered his appearance on behalf of Local Records. *See* Docket 5. Because Local Records retained a Tennessee attorney, the State agreed to continue the hearing on the State's Petition to Compel to allow Local Records' new counsel additional time to comply with the Request and/or respond to the State's Petition to Compel. *See* Docket No. 7.

10. On July 11, 2013, Local Records provided a partial response to the State's Request, but otherwise asserted multiple objections. *See* Exhibit G to Doty Aff. Local

Records asserted blanket objections to the Request, *id.* at 1-2, and provided nonresponsive, extremely limited or evasive responses to all of the State's document requests. *Id.* at 3-7. Local Records also attached a copy of its entire website to its purported response, *id.* at Ex. A to Ex. G, along with a few other documents, *id.* at Ex. B-C. Local Records failed, however, to verify its responses under oath as required by Tenn. Code Ann. § 47-18-106(a)(1). *See* Ex. G to Doty Aff.

11. Local Records provided no further information to the State, failed to answer the State's April 17, 2013 Petition, *see* Docket Nos. 1 – 12, but on August 6, 2013, filed a Motion for a Protective Order. *See* Docket No. 9.

II. LEGAL ARGUMENT

The TCPA was enacted to “protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part of wholly within this state.” *See* Tenn. Code Act § 47-18-102(2). The TCPA further authorizes the Division and the Attorney General to investigate wrongdoing and to institute civil enforcement proceedings against wrongdoers. *See* Tenn. Code Ann. §§ 47-18-106, -107, and -108.

“As the chief law enforcement officer of the state, the [Tennessee] attorney general may exercise such authority as the public interest may require and may file suits necessary for the enforcement of state laws and public protection.” *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. 1991). To aid his consumer protection investigations, “the Attorney General is empowered to engage in extensive pre-complaint discovery if he has reasonable cause to believe that the investigated party has violated the Act.” *People v. Herndon*, 581 P.2d 688

(Ariz. 1978). Among other things, the Attorney General may, at the request of the Division, conduct investigations as set forth in Tenn. Code Ann. § 47-18-106.

Under Tenn. Code Ann. § 47-18-106(a), whenever the Division “has reason to believe that a person is engaging in, has engaged in, or, based upon information received from another law enforcement agency, is about to engage in any act or practice declared to be unlawful by this part, or has reason to believe it to be in the public interest to conduct an investigation to ascertain whether any person is engaging in, has engaged in, or is about to engage in such act or practice,” it may, through the Attorney General “[r]equire the person to file a statement or report in writing, under oath or otherwise, as to all facts and circumstances concerning the alleged violation and to furnish and make available for examination whatever documentary material and information are relevant to the subject matter of the investigation.” *See* Tenn. Code Ann. § 47-18-106(a)(1). As seen in the State’s Request, the Attorney General required the Local Records to provide written responses to one interrogatory and seven requests for production. *See* Ex. F to Doty Aff.

“The burden of showing that the request is unreasonable is on the subpoenaed party.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977)) (citing *United States v. Powell*, 379 U.S. 48, 58 (1964); *FTC v. Standard Am., Inc.*, 306 F.2d 231, 235 (3rd Cir. 1962). *See also* *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 898 F. Supp.2d 171, 174 (D.D.C. 2012).¹

¹ Federal Trade Commission law is especially relevant here because the general assembly has mandated that the TCPA “shall be interpreted and construed consistently with the interpretations given by the federal trade commission and the federal courts pursuant to § 5(A)(1) of the Federal Trade Commission Act.” *See* Tenn. Code Ann. § 47-18-115.

Moreover, “where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met. *FTC v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979) (citing *SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973)). *See also* *FTC v. Texaco, Inc.*, 555 F.2d at 882; *Genuine Parts v. FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971); *Adams v. FTC*, 296 F.2d 861, 867 (8th Cir. 1961).

Local Records’ Motion for Protective Order is Untimely

Tenn. Code Ann. § 47-18-106(b) permits a person served with a Request to seek a protective order “within ten (10) days following notice of such a request,” and only upon identifying “good cause” for such relief:

At any time prior to the return date specified in the division’s request for information pursuant to subsection (a), or within ten (10) days following notice of such a request, whichever is shorter, any person for whom information has been requested may petition the circuit or chancery court of Davidson County, stating good cause, for a protective order to extend the return date for a reasonable time, or to modify or set aside the request.

Tenn. Code Ann. § 47-18-106(b) is the exclusive statutory mechanism for seeking a protective order under the Tennessee Consumer Protection Act (“TCPA”).

Here, the Local Records waited ten months to seek a protective order, well beyond the ten day statutory deadline. Furthermore, Local Records failed to seek any extension of time for doing so either from the State or from the Court. Local Records therefore has no standing to seek a protective order now nor is otherwise entitled to raise grossly belated objections.

Local Records argues that because it waited to hire Tennessee counsel until May 2013, it is somehow exempt from complying with the explicit statutory requirement of seeking a protective order within 10 days of notice of the Request. This argument is without

merit. Retaining Tennessee counsel is not a prerequisite to the strict 10 day compliance period set forth in Tenn. Code Ann. § 47-18-106(b) and not surprisingly, Local Records has failed to submit any authority in support of its argument.

The undisputed facts confirm that Local Records had California counsel in place shortly after receiving the State's Request, and at least sixteen days after the State's Request was issued, as evidenced by California counsel's blanket refusal to cooperate with the Attorney General's Request. *See* Ex. B to Doty Aff. Indeed, the California attorney's letter was sent within a mere sixteen days after the Request was issued to Local Records. *Id.* Local Records' own argument undermines its position and bespeaks its continuing course of delay and evasion.

**Local Records Has Failed to Carry Its Burden of
Demonstrating There is Good Cause for a Protective Order**

Even if Local Record's motion was timely, its application for a protective order still fails because Local Records has not carried its burden of demonstrating there is "good cause" warranting a protective order here. Notably, the subpoenaed party must prove, through introduction of evidence, that compliance with the administrative subpoena is unduly burdensome. While courts recognize that "some burden on the subpoenaed party is to be expected," *FTC v Church & Dwight Co.*, 747 F. Supp.2d 3, 8 (D.D.C. 2011), "the standard for showing that a request is unduly burdensome is a high one." *Id.* (citing *FTC v. Texaco, Inc.*, 555 F.2d at 882). Moreover, "[i]n the administrative context, however, a much stronger showing of 'undue burden' is required." *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 898 F. Supp.2d at 174 (citing *FTC v. Texaco, Inc.*, 555 F.2d at 882).

Here, Local Records claims that it would be “unduly burdensome” to produce a copy of each and every advertisement it sent into Tennessee in the past two years. This argument is disingenuous. The State is not seeking multiple, identical copies of every single mailing Local Records sent to each Tennessee consumer, and no such request is being made. See Doty Aff. Ex. F. Here, the State seeks nothing more than one copy of each unique advertisement Local Records circulated in Tennessee, not hundreds or thousands of copies of the same advertisement. In addition, a request for such advertising is clearly relevant to the issue of whether Local Records has engaged in an “unfair or deceptive” business practice under the TCPA. *See* Tenn. Code Ann. § 47-18-104(a). Most importantly, however, Local Records has submitted no evidence, nor otherwise made any showing demonstrating why the State’s request for this information would be burdensome. The State is therefore entitled to a complete, verified response of record to this request.

Absent any showing, Local Records similarly complains that the State’s requests are “irrelevant.” The requirement that the information sought in an investigative subpoena be “reasonably relevant” means “reasonably relevant to the intended investigation, not to any judicial hearing.” *Fielder v. Berkeley Properties Co.*, 23 Cal. App. 3d 30, 38-39 (Ct.App.Cal. 1972). *See also EEOC v. Lockheed Martin Corp, Aero & Naval Systems*, 116 F.3d 110, 113 (4th Cir. 1997) (“We determine relevance ‘in terms of the investigation’ rather than in terms of evidentiary relevance.”) (citing *NLRB v. North Am. Van Lines, Inc.*, 611 F. Supp. 760, 764 (N.D. Inc. 1985)). The government’s own appraisal of relevancy must be accepted by the court so long as it is not “obviously wrong. *FTC v Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (citing *FTC v Carter*, 636 F.2d 781, 787-88

(D.C. Cir. 1980)).

In order to determine whether an item is relevant, a reviewing court must compare the challenged request with the stated purpose of the inquiry. *Matter of Attorney General's Civil Investigative Demand*, 493 A.2d 972 (1985). As the court noted in *FTC v. Texaco, Inc.*, 555 F.2d at 874:

[I]n the pre-complaint stage, an investigative agency is under no obligation to propound a narrowly focused theory of a possible future case. Accordingly, the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation. The district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges. The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not and need not, ever issue.

The requirement of relevancy in the case of an administrative subpoena issued under the Consumer Protection Act is satisfied by a showing that a relationship exists between the documents sought and the purposes of the inquiry. *People v. Am. Banco Corp.*, 570 P.2d 825, 839 (Colo. 1977).

Here, the State is not seeking information necessary to prove any specific charges; it merely seeks to learn if the law is being violated and whether to file a complaint. Under such circumstances, the law requires that courts give agencies leeway when considering relevance objections. *FTC v. Texaco, Inc.*, 555 F.2d at 872. The requested documents, therefore, need only be relevant to the investigation – the boundary of which may be defined quite broadly. See *FTC v. Carter*, 636 F.2d at 787-88; *FTC v. Texaco*, 555 F.2d at 874 & n.26.

Local Records claims that the amount of sales by year nationwide and in Tennessee is “irrelevant” to an investigation of violations of the TCPA. The amount of revenue Local

records realized from potentially unlawful activity in Tennessee and elsewhere is relevant to the issues of the amount of harm that occurred in whole or in part in Tennessee, *see* Tenn. Code Ann. § 47-18-102(2), the amount of restitution due to Tennessee consumers and others, and the appropriate remedy or relief the State should seek if it decided to file a complaint against Local Records. Furthermore, such information would enable the State to better approach a voluntary resolution of this matter through an Assurance of Voluntary Compliance as set forth in Tenn. Code Ann. § 47-18-107.

Information regarding similar incidents, complaints and similar law enforcement matters is also relevant to the State's investigation. Local Records' claim that the State's request for "any and all documents reflecting any correspondence with any law enforcement entity" and "any and all complaints, pleadings, memoranda, court orders, court opinions, etc." are "beyond the scope of any investigation into alleged violations of the TCPA" is simply unfounded and without basis. Reviewing what Local Records has done in other states, and how other states have responded, is highly relevant to the State in assessing how to proceed. Similarly, Local Records' claim that sales data and customer information are not relevant also fail for this reason. Again, the State cannot assess how widespread Local Records' activities in Tennessee have been and remain, nor how many consumers have been affected by its conduct, and the case law recognizes as much. *See, e.g., Matter of Attorney General's Civil Investigative Demand*, 493 A.2d 972 (1985) (Holding that similar requests were relevant to the state's investigation).

III. CONCLUSION

The State respectfully submits state that Local Records has no standing to challenge

the State's investigative subpoena by seeking a protective order because Local Records failed to exercise its right to a special statutory proceeding to contest the State's investigative subpoena within ten days of notice as required by Tenn. Code. Ann. § 47-18-106(b), which is the exclusive statutory mechanism for seeking a protective order or seeking to modify or set aside an investigative subpoena under the TCPA. Moreover, Local Records has failed to carry its "heavy burden" of demonstrating that any of the State's document requests are unduly burdensome or irrelevant. Local Records has therefore failed to make a showing that there is "good cause" for a protective order as required by Tenn. Code. Ann. § 47-18-106(b). For all of these reasons, the State's Petition should be granted and Local Records' Motion for a Protective Order should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, OLHA N.N. RYBAKOFF, hereby certify that on August 26, 2013, I caused a true and exact copy of the foregoing PETITIONER STATE OF TENNESSEE'S RESPONSE AND OPPOSITION TO RESPONDENT LOCAL RECORD OFFICE'S MOTION FOR PROTECTIVE ORDER and EXHIBITS thereto to be served upon Respondents by placing the same in the United States Mail, postage prepaid, addressed as follows:

Don Hearn, Jr., Esquire
6000 Poplar Ave.
Suite 400
Memphis, TN 38119



OLHA N.N. RYBAKOFF, BPR No. 24254